

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MATTHEW G. SILVA,

Plaintiff,

v.

CARLA SCHETTLER, *et al.*,

Defendants.

NO. CV-08-5041-EFS

**ORDER DENYING PLAINTIFF'S
MOTION TO EXTEND AND GRANTING
DEFENDANTS' MOTION TO DISMISS**

In June 2008, pro se Plaintiff Matthew G. Silva sued three (3) Washington State Penitentiary ("WSP") employees under 42 U.S.C. § 1983 for events arising out of their alleged failure to photocopy legal materials. Defendants moved to dismiss Plaintiff's § 1983 action based on his failure to exhaust administrative remedies. (Ct. Rec. [7](#).) After review, the Court agrees: Plaintiff's failure to abide by WSP's grievance system warrants dismissal of this action without prejudice. Providing Plaintiff with an opportunity to supplement his briefing is therefore unnecessary. The reasons for the Court's Order are set forth below.

I. Background

A. Procedural Posture

On June 9, 2008, Plaintiff filed suit under 42 U.S.C. § 1983 against Defendants Carla Schettler, Lori Scamahorn, and Lee Young in Walla Walla Superior Court. (Ct. Rec. 1.) Plaintiff alleges in his Complaint that Defendants 1) denied him meaningful access to the courts by refusing to photocopy two (2) legal documents, which caused him to miss deadlines in two (2) unrelated federal actions, and 2) retaliated against him for complaining about their conduct. Defendants removed the case to federal court in July 2008. *Id.* After answering Plaintiff's Complaint, Defendants moved on March 11, 2009, to dismiss Plaintiff's Complaint for, *inter alia*, failure to exhaust administrative remedies. (Ct. Rec. 7.) Per standard procedure, the Clerk's Office sent Plaintiff a *Klinge*le Advisory,¹ which explained the significance of Defendants' pending dismissal motion and the consequences of inaction. (Ct. Rec. 13.)

At the March 17, 2009 telephonic scheduling conference, Plaintiff requested additional time to respond to the pending dismissal motion because he was awaiting legal files from Thurston County Superior Court. (Ct. Rec. 18.) The Court obliged and extended Plaintiff's response deadline to April 10, 2009. (Ct. Rec. 21.) After additional motions practice, the Court extended Plaintiff's response deadline on three (3) other occasions: from April 10, 2009, to July 7, 2009 (Ct. Rec. 28); from July 7, 2009, to September 8, 2009 (Ct. Rec. 32); and from September 8, 2009, to October 9, 2009 (Ct. Rec. 34). The Court advised Plaintiff in

¹See *Klinge*le v. *Eikenberry*, 849 F.2d 409 (9th Cir. 1988)

1 its August and September 2009 Orders that no further extensions would be
2 granted considering Defendants' motion had been pending by that time for
3 over five (5) months. (Ct. Recs. 32 & 34.)

4 On October 15, 2009, Plaintiff filed a letter with the Court.
5 (Ct. Rec. 35.) The letter, which was dated October 9, 2009, not only
6 responded to Defendants' dismissal motion, but also requested yet another
7 extension in order to supplement the letter with legal authority.

8 **B. The Inmate Grievance System**

9 WSP has had an inmate grievance system in place since the mid-80s.
10 (Ct. Rec. 8-2 at 2.) The system enables inmates to challenge
11 1) Department of Corrections ("DOC") policies and procedures, 2) the
12 application of DOC policies and procedures, 3) the lack of policies with
13 respect to living conditions, 4) staff action, 5) actions of other
14 inmates, 6) staff retaliation for filing grievances, and 7) physical
15 plant conditions. *Id.*

16 The system is divided into four (4) different review levels.
17 Level 0 is the "initial intake," where generalized grievances are
18 screened and informal resolution is pursued. *Id.* at 3. Level 1 is
19 reserved for emergencies, complaints against other inmates, or complaints
20 about DOC policies and procedures. *Id.* Level 2 is reserved for
21 grievances about staff action and review of Level 1 grievance responses.
22 *Id.* Level 3 is reserved for review of Level 2 grievance responses. *Id.*
23 at 4.

24 To avoid flooding the system with frivolous complaints, WSP
25 restricts inmates to a maximum of five (5) active grievances at any one
26 time. *Id.* If an inmate reaches his quota, then the only way a new

1 grievance will be processed is if an existing grievance is withdrawn.
2 *Id.*

3 Inmates can file "emergency grievances," which are immediately
4 processed as Level 1 grievances, if an issue arises that threatens their
5 health and safety. *Id.* at 3. Issues concerning photocopy access do not
6 constitute "emergencies." *Id.*

7 **C. Plaintiff's Grievances**

8 In late-April 2009, Plaintiff submitted requests for legal copies
9 to WSP staff. (Ct. Rec. 1 at 3.) When his requests went unanswered,
10 Plaintiff filed two (2) emergency grievances: the first on April 28,
11 2009; the second on April 29, 2009. (Ct. Rec. 8-2 at 5.) WSP's
12 grievance coordinator informed Plaintiff that 1) his grievances needed
13 to be resubmitted as Level 1 grievances, and 2) he had reached his
14 grievance quota and needed to withdraw an existing grievance in order for
15 his new grievances to be processed. *Id.* Plaintiff refused to do so.
16 *Id.*

17 **II. Discussion**

18 **A. Plaintiff's Motion to Extend (Ct. Rec. 35)**

19 Plaintiff seeks to extend the October 9, 2009 response deadline by
20 two (2) weeks so that he can supplement his letter/response with legal
21 citations. (Ct. Rec. 35 at 3.) After review, the Court finds that an
22 extension is unwarranted for two (2) reasons.

23 First, Plaintiff has had ample opportunity to thoroughly research
24 and respond to Defendants' dismissal motion. To date, the Court has
25 granted four (4) separate extension requests since early-March 2009,
26 giving Plaintiff over seven (7) months to respond to a straightforward

1 dismissal motion. Moreover, the Court made it explicitly clear in both
2 its August and September 2009 Orders that additional extension requests
3 would not be entertained. (Ct. Recs. 32 & 34.) Second, Plaintiff's
4 extension request is predicated on the need for time to supplement his
5 response with legal authority. Supplementation is unnecessary, however,
6 because, as set forth below, Plaintiff failed to exhaust his
7 administrative remedies. Accordingly, Plaintiff's extension request is
8 denied.

9 **B. Defendants' Motion to Dismiss (Ct. Rec. 7)**

10 Defendants argue that Plaintiff failed to exhaust administrative
11 remedies because he ran afoul WSP's grievance quota. (Ct. Rec. 8 at 13.)
12 Plaintiff counters that not only are WSP's grievance policies not
13 followed, but also that the entire system is unconstitutional because it
14 prohibits inmates from citing statutes or case law in their complaints.
15 (Ct. Rec. 35 at 2.)²

16 The Prisoner Litigation Reform Act ("PLRA") provides that "[n]o
17 action shall be brought with respect to prison conditions under [42
18 U.S.C. § 1983] . . . by a prisoner . . . until such administrative
19 remedies as are available are exhausted." 42 U.S.C. § 1997e. Exhaustion
20 is mandatory. *Booth v. Churner*, 532 U.S. 731, 741 (2001). Exhaustion
21 also must be proper. *Woodford v. Ngo*, 548 U.S. 81, 92 (2006) (holding
22

23 ²Plaintiff's unconstitutionality argument, which is nothing more
24 than an objection to WSP's grievance protocol, is easily dispatched
25 because inmates do not have a constitutional right to specific grievance
26 procedures. See *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003).

1 that an untimely or otherwise procedurally defective administrative
2 grievance does not satisfy PLRA's exhaustion requirement). Strict
3 exhaustion requirements promote judicial efficiency and allow "prison
4 officials an opportunity to resolve disputes concerning the exercise of
5 their responsibilities before being haled into court." *Jones v. Block*,
6 549 U.S. 199, 202 (2007).

7 The PLRA exhaustion requirement is not jurisdictional; rather, it
8 creates an affirmative defense that a defendant may raise in a non-
9 enumerated Rule 12(b) motion. See *id.* at 216 ("[I]nmates are not
10 required to specially plead or demonstrate exhaustion in their
11 complaints."); *Wyatt v. Terhune*, 315 F.3d 1108, 1117-19 (9th Cir.), *cert.*
12 *denied sub nom. Alameida v. Wyatt*, 540 U.S. 810 (2003). The defendant
13 bears the burden of raising and proving the absence of exhaustion.
14 *Wyatt*, 315 F.3d at 1119. While a district court may look beyond the
15 pleadings in deciding a motion to dismiss for failure to exhaust
16 administrative remedies, it must assure that the prisoner has fair notice
17 of his or her opportunity to develop a record. *Id.* at 1120 n.14.³ If a
18 district court concludes that the prisoner failed to exhaust
19 administrative remedies, the proper remedy is dismissal without
20 prejudice. *Id.*

21 Importantly, exhaustion is not required if there is no available
22 administrative remedy. See *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir.
23 2005). Administrative remedies are available so long as some form of
24

25 ³This notice requirement is satisfied because Plaintiff received a
26 *Klingele* Advisory in March 2009. (Ct. Rec. 13.)

1 redress may be obtained through an established procedure. *Booth*, 532
2 U.S. at at 738-39.

3 Here, administrative remedies are available because WSP has an
4 established grievance system for addressing both photocopy procedure
5 violations and retaliatory conduct by WSP staff. (Ct. Rec. 8-2 at 2.)
6 The sole issue is, therefore, whether Plaintiff properly utilized the
7 established grievance system. He did not.

8 DOC staff informed Plaintiff informed shortly after he filed his
9 April 2009 emergency grievances that he had reached his grievance quota
10 and therefore needed to withdraw existing grievances in order for his new
11 grievances to be processed. *Id.* at 5. Plaintiff refused to do so. *Id.*
12 Because Plaintiff refused to withdraw his existing grievances, WSP never
13 investigated Plaintiff's claims - the same claims that form the basis for
14 the current § 1983 action. Accordingly, there was no chance for prison
15 officials to address the photocopying and retaliation issues "before
16 being haled into court." *Jones*, 549 U.S. at 202.

17 **III. Conclusion**

18 The PLRA's purpose is two-fold. First, it seeks to eliminate
19 unwarranted federal court interference with prison administration by
20 affording corrections officials time to internally address complaints.
21 *Porter v. Nussle*, 543 U.S. 516, 525 (2002). And second, it reduces the
22 quantity and improves the quality of prisoner suits. *Id.* at 524.
23 Permitting Plaintiff to proceed with his § 1983 claims undermines both
24 these purposes because the Court wastes valuable judicial resources by
25 prematurely meddling in prison administration, an area "peculiarly within
26 the province of the legislative and executive branches of government."

1 *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Dismissal is therefore
2 proper.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. Plaintiff's Motion to Extend (Ct. Rec. [35](#)) is **DENIED**;

5 2. Defendants' Motion to Dismiss (Ct. Rec. [7](#)) is **GRANTED**;

6 3. Plaintiff's Complaint (Ct. Rec. [1](#)) is **DISMISSED WITHOUT PREJUDICE**
7 and judgment shall be entered in Defendants' favor;

8 4. All pending trial and hearing dates are **STRICKEN**;

9 5. All pretrial motions are **DENIED AS MOOT**; and

10 6. This file shall be **CLOSED**.

11 **IT IS SO ORDERED.** The District Court Executive is directed to enter
12 this Order, enter judgment and provide a copy to defense counsel and to
13 Plaintiff.

14 **DATED** this 20th day of October 2009.

15
16 S/ Edward F. Shea

EDWARD F. SHEA

17 United States District Judge

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